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No. 83-1973

In the Supreme Court of the United States

OCTOBER TERM, 1984

HERBERT JORDAN, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that the court of appeals improperly sustained the Secretary's determination that petitioner was not disabled within the meaning of the Social Security Act as of June 30, 1963. Specifically, petitioner claims that the Secretary and the reviewing courts erroneously declined to accord preclusive effect to the decision of the Court of Claims in *Jordan* v. *United States,* 205 Ct. Cl. 65 (1974), holding that petitioner was entitled to military disability retirement as of December 10, 1958, the date of his discharge from the Army.

1. Petitioner filed an application for Social Security disability insurance benefits on July 27, 1973. The Social Security Administration denied the application initially and adhered to its decision on reconsideration. A de novo hearing was then held before an administrative law judge.

The ALJ noted that the last date on which petitioner had met the earnings eligibility requirements of the Social Security Act applicable to disability insurance benefits was June 30, 1963 (Pet. App. 32a). Accordingly, to be entitled to benefits, petitioner had to establish that he became disabled within the meaning of the Social Security Act prior to that date. The ALJ observed that petitioner had suffered a stroke while in the Army in 1955; that, following his discharge at the end of his enlistment in 1958, he had received disability benefits from the Veterans' Administration; and that petitioner's original discharge had ultimately been set aside in favor of a military disability retirement (Pet. App. 28a-29a). The ALJ also noted, however, that petitioner had been employed as a nursing assistant at the VA hospital in Montgomery, Alabama, between 1961 and 1964, at which time he suffered another stroke that prevented him from continuing his work (*id.* at 29a, 32a). The ALJ concluded that petitioner had failed to establish that his ailments "were of such severity prior to June 30, 1963, as would prevent him from performing substantial gainful work activity" appropriate for one of his age, education and prior work experience (*id.* at 32a). On March 6, 1980, the Social Security Appeals Council upheld the ALJ's ruling (see *id.* at 13a).

Petitioner filed an action for judicial review of the final agency decision pursuant to 42 U.S.C. 405(g) in the United States District Court for the Middle District of Alabama. The district court referred the matter to a magistrate, who concluded that the agency's action was supported by substantial evidence and recommended that the Secretary's decision be sustained (Pet. App. 1a-9a). The magistrate rejected petitioner's argument that the Court of Claims' decision in *Jordan* v. *United States, supra,* required the Secretary to award him disability benefits. The magistrate explained that disability under the Social Security Act is

defined differently from disability in other legal contexts, and that the Court of Claims' findings and proceedings were outside the administrative record of this case (Pet. App. 2a-4a). The district court adopted the magistrate's recommendation (*id.* at 10a).

The court of appeals affirmed in an unpublished opinion (Pet. App. 13a-21a). Petitioner argued that, in light of the Court of Claims' decision in *Jordan* v. *United States, supra,* which held that he was 60% disabled at the time of his 1958 discharge, res judicata or collateral estoppel required the Secretary to award him disability benefits. As he does in this Court (see Pet. 4-5), petitioner relied, in particular, upon the following language from the Court of Claims' findings of fact (205 Ct. Cl. at 99):

> 21. (a) On March 27, 1962 [petitioner] was examined by the VA at its facility in Montgomery, Alabama, for an evaluation of his disability. At that time, he was employed at the Veterans Administration Hospital in Montgomery as a nursing assistant. The examining physician stated that: "Gross examination and observation of this veteran, one cannot see how he can be a nursing assistant at the VAH. He is not physically able to do the work anywhere near satisfactorily or enough to be worth hiring a man in this situation."

The court of appeals recognized that the ALJ's comment (Pet. App. 31a) that petitioner had "performed to the obvious satisfaction of the parties" in his job at the VA was contradicted by the Court of Claims' finding quoted above (*id.* at 17a). Moreover, because petitioner was without counsel in the administrative proceedings, the court of appeals did not rest its decision upon petitioner's failure to raise the preclusion claim before the ALJ (*id.* at 19a). The court of appeals found it unnecessary, as well, to decide whether the findings of the Court of Claims bound the

Secretary (*ibid.*). Rather, assuming that these findings were binding, the court of appeals concluded that they did not occasion any different disposition of the disability claim (*id.* at 19a-20a).

The court of appeals noted that petitioner had the burden of establishing his disability, and that it was undisputed that petitioner was in fact employed for over a year after the time he claimed he was unable to work (Pet. App. 20a). The court explained (*ibid.*): "Whether or not an examining physician questioned [petitioner's] ability to handle the nursing assistant job (finding of fact 21.(a)), it is clear that [petitioner]continued to hold down that job well past June 30, 1963."The court also observed that the record showed that the ALJ was aware of petitioner's claim that he was in fact unable to perform the duties associated with the nursing assistant's job he had held (Pet. App. 20a n.2).

2. Petitioner claims (Pet. 5-8) that the court of appeals refused to give determinative effect to the Court of Claims' decision in *Jordan* v. *United States, supra,* because it improperly relied upon the rule that judicial review of administrative action is limited to the agency record. Petitioner misapprehends the court of appeals' ruling. Because petitioner had no counsel in the proceedings before the ALJ, the court of appeals stated (Pet. App. 19a): "We * * * do not find the omissions from the record controlling." Petitioner quotes out of context (Pet. 6) the following statement from the court of appeals' opinion (Pet. App. 19a):

> This court agrees with the court below that a review of the decision of the Secretary must be limited to an examination of the evidence before the administrative law judge. The court is not allowed to look at evidence beyond the record in determining whether the criteria of substantial evidence was met.

But this passage merely announced the court of appeals' adherence to the general rule, which is of undoubted validity. See 42 U.S.C. 405(g). As we have noted, because of petitioner's pro se status in the administrative proceedings, the court declined to apply the general rule in this case. There is accordingly no occasion for considering here whether, as petitioner seems to urge, preclusion doctrines justify an exception to the usual limitation on judicial review to the record before the administrative agency.[1]

3. a. Petitioner claims (Pet. 8-10) that the court of appeals erroneously decided that preclusion doctrines do not apply to administrative determinations under the Social Security Act. In fact, the court of appeals explicitly stated that it "decline[d] to decide this argument" (Pet. App. 19a), because it was unnecessary to do so in this case. Rather, as we have explained (pages 3-4, *supra*), the court of appeals assumed that the Court of Claims' findings were binding to the extent that they were applicable, but concluded that none of those findings was inconsistent with the Secretary's conclusion that petitioner had not established disability as of the critical date, June 30, 1963.

Petitioner has not taken issue with the court of appeals' conclusion that there was no inconsistency between the Secretary's denial of disability benefits and the Court of Claims' Finding 21.(a). Nor is any necessary inconsistency

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[1]In *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984) (*Stauffer II*), the Court approved the application of collateral estoppel even though the estoppel argument had been raised for the first time in the court of appeals. Slip op. 3 n.2. The Court took care to explain, however, that the decision (*Stauffer I*) upon which the preclusion claim was based had not been rendered at the time *Stauffer II* was in the district court. Slip op. 3 n.2. At least when a matter as to which preclusion is asserted is factual, and thus should be considered by an agency at the time the evidence in the record is assessed, there is no reason to excuse a litigant's failure to raise his estoppel claim at the earliest opportunity.

apparent. The finding that an examining physician questioned petitioner's fitness to perform his nursing assistant's job on a given date in 1962 certainly does not establish that petitioner was in fact unable to hold that job — a point that was not in issue before the Court of Claims.[2]

Moreover, as the court of appeals emphasized, the Secretary was plainly authorized to consider, together with the 1962 medical evaluation, the fact that petitioner did continue to work for some two years thereafter. Under the Social Security Act, of course, the controlling question was not whether petitioner was fit to perform his nursing assistant's job, but whether his impairments were of "such severity that he [was] not only unable to do his previous work but [could] not, considering his age, education, and work experience, engage in any kind of substantial work which exists in the national economy" (42 U.S.C. 423(d)(2)(A)). See *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 1-2. The Secretary's finding that petitioner had not borne the burden of demonstrating disability under this standard was not inconsistent with the Court of Claims' Finding 21.(a).[3]

b. Petitioner's repeated references to res judicata in addition to collateral estoppel (see Pet. 5, 6, 8) suggest that he may intend to invoke the claim preclusion doctrine as well as the related doctrine of issue preclusion (collateral estoppel). See *Allen* v. *McCurry*, 449 U.S. 90, 94 n.5 (1980); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). But res judicata is plainly inapplicable here because

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[2]The issue before the Court of Claims was, of course, whether petitioner was fit to perform his military duty as a sergeant at the time of his separation in 1958.

[3]Petitioner has not alleged that any other specific finding of the Court of Claims was inconsistent with the Secretary's ruling. See Pet. 5.

petitioner's application for Social Security disability benefits is not the same "claim" as his earlier request for military disability retirement benefits.

The issue decided in *Jordan* v. *United States, supra,* was whether petitioner was unfit to perform his particular military duties. The statutory standard for military disability retirement — unfitness to perform the duties of the service member's particular "office, grade, rank, or rating because of physical disability" incurred while in service (10 U.S.C. 1201) — is significantly different from the standard applicable under the Social Security Act. See page 6, *supra.* Accordingly, the Court of Claims' conclusion that petitioner was eligible for military disability retirement in 1958 did not bar the Secretary from determining that petitioner was not disabled within the meaning of the Social Security Act in 1963.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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